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No. 93-775

In The

Supreme Court of the United States

October Term, 1993

HARLINE K. GEORGE, *et al.*,

Petitioner,

v.

LEONARD ZLOTOFF and LOIS ZLOTOFF,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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1. INTRODUCTION

There is absolutely no basis for this Court to review Harline K. George, now known as Harline K. Prochazka's ("George") writ of certiorari. The Fourth District Court of Appeal's decision is not in conflict with other decisions on federal labor law preemption nor are there unsettled or important questions of federal law raised by this Petition.

The Fourth District Court of Appeal's 17 page unpublished opinion was based upon a careful review and analysis of the evidence and law. After such review the Court of Appeal concluded that plaintiff's action was arguably preempted by the exclusive jurisdiction of the National Labor Relations Board ("NLRB") as George's lawsuit sought to enforce an NLRB order, a matter governed exclusively by the National Labor Relations Act ("NLRA"). There is no federal court authority inconsistent with this ruling. In fact, all reported case law compels the same conclusion reached by the Fourth District. While George may not agree with the Fourth District's analysis and decision, there is absolutely no grounds for a petition to the U.S. Supreme Court.

2. STATEMENT OF THE CASE

On September 30, 1982, the NLRB ordered that a corporation known as Aztec Bus Lines, Inc. ("Aztec") reinstate and pay back wages to George, as well as other similarly situated bus drivers. That decision, which forms the basis for George's right to damages in this action, arose out of a strike by Aztec employees, on or about

August 23, 1980, and George's and the other strike employees' unconditional offer to return to work in April of 1981. The NLRB found that, by failing to reinstate the plaintiff, as well as other strikers, Aztec Bus Lines had violated Sections 8(a)(1) and (3) of the NLRA, and ordered the strikers reinstated, with back pay from April 4, 1981 until the date of reinstatement.[1]

In 1979, prior to the strike and the subsequent proceedings before the NLRB, the respondents herein, Leonard and Lois Zlotoff ("Zlotoff"), sold their interest in Aztec Bus Lines to an individual known as Augustus Zemba. Subsequent to the decision by the NLRB, Mr. Zemba defaulted on installment payments to the Zlotoffs and they regained ownership of Aztec.

On December 31, 1986, the Zlotoffs agreed in writing to sell their stock in Aztec to a James Pike. The Stock Purchase Agreement provided in part that: "It is the intent of the parties that seller [Zlotoffs] bear the liabilities existing as of December 31, 1986, and buyer [Pike] bear the risk of operations thereafter."

On July 27, 1989, the United States Court of Appeal for the District of Columbia Circuit confirmed the NLRB award. On September 12, 1989, the United States District Court for the Southern District of California entered judgment in favor of the union and against Aztec requiring

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[1] This Statement of the Case is taken from the Fourth District Court of Appeal's Decision, which is attached to George's Petition. The factual background contained in that decision, which is undisputed, was based upon the allegations of George's Complaint and those matters of which the Fourth District took judicial notice.

compliance with the orders of the NLRB, including reinstatement and back pay.

On August 16, 1990, the union filed an unfair labor practice charge with the NLRB as against the Zlotoffs, Pike and Star Line Sightseeing Tours, Inc. ("Starline"), alleging that these individuals and entity were Aztec's "successor employer group" and that they had violated the NLRB's 1982 and 1988 decisions and orders by failing to reinstate and pay back pay to striking workers. In support of this charge, the union's counsel asserted that Zlotoffs were liable under the 1986 Stock Purchase Agreement for the reinstatement and back pay order issued by the NLRB.

On September 6, 1990, the NLRB's acting regional director declined to issue a complaint on the unfair labor practice charge filed by the union, stating in part that:

> As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The investigation reveals insufficient evidence to conclude that Starline Tours, Inc., Leonard Zlotoff, Lois Zlotoff, and James A. Pike, or any of them, constitute an alter ego or a disguised continuation of Aztec Bus Lines, Inc.

Shortly after this refusal by the NLRB to enforce its own order against the Zlotoffs, George filed a Complaint on December 29, 1990, in San Diego Superior Court alleging that she was the third-party beneficiary of the 1986 Stock Purchase Agreement, by which the Zlotoffs had purportedly agreed to accept liability for the NLRB order. George alleged that by virtue of this Agreement, she was entitled to enforce the NLRB order against the Zlotoffs in state court.

Subsequent to the filing of George's Complaint in state court, the Zlotoffs filed a motion for judgment on the pleadings on November 3, 1991. This motion was based upon the allegation that, since the subject matter of George's Complaint was the same as a claim that could have been (and in fact was) presented to the NLRB, it was preempted by the exclusive jurisdiction of that agency over labor law matters. On November 22, 1992, the trial court granted judgment on the pleadings in Zlotoffs' favor, without leave to amend. In reaching its decision, the trial court concluded that "the present action is arguably within the jurisdiction of the National Labor Relations Board." The court then entered judgment in favor of the Zlotoffs and dismissed George's Complaint with prejudice.

George filed a notice of appeal on this ruling on March 5, 1992. After briefing by the parties and oral argument, the Court of Appeal on May 12, 1993 issued a 17 page unpublished decision upholding and affirming the decision by the San Diego Superior Court. The Fourth District Court of Appeal held that the Zlotoffs had met their burden showing that the plaintiff's claim, although artfully pleaded as a breach of contract action, was "arguably" within the jurisdiction of the NLRB as it was in reality an attempt to enforce an order of that agency.

George now takes issue with the Fourth District Court of Appeal's decision in this Petition for Review. However, as the following discussion will reveal, there are simply no grounds for review of the Fourth District's decision by this Court.

3. NO GROUNDS EXIST FOR GRANTING CERTIORARI.

A. The Fourth District Court of Appeal Decision Does Not Conflict With Any United States Supreme Court Decisions On *Garmon* Preemption.

Contrary to George's unsupported assertions in her Petition, the scope of federal labor law preemption has not been narrowed in recent years. Rather, since the original rule for federal labor law preemption was laid down in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court, and federal courts of appeal, have refined and, indeed, *expanded* the coverage of preemption to ensure that there is no conflict between state courts and federal administration of labor disputes. This case law makes clear that the Fourth District Court of Appeal was well within the scope of U.S. Supreme Court decisions when it held that the plaintiff's state court claim attempting to enforce an order of the NLRB was preempted.

The principles of labor preemption, which began with *San Diego Bldg. Trades v. Garmon, supra*, are well established. With the NLRA, Congress established a "comprehensive amalgam of substantive law and regulatory arrangements . . . to govern labor-management relations affecting interstate commerce." *Local 926, Int'l Union of Operating Engrs. v. Jones*, 460 U.S. 669, 675-76, 103 S. Ct. 1453 (1983). A critical element of that amalgam is the NLRB's primary jurisdiction in interpreting and enforcing federal labor law. *Garmon, supra*, 359 U.S. at 242-45. Labor preemption serves to ensure that state law does not frustrate either the substantive policies established by the

NLRA or the regulatory mechanisms through which those policies are implemented. "[T]he broad powers conferred by Congress upon the National Labor Relations Board to interpret and enforce" the federal labor laws "necessarily imply that potentially conflicting rules of law, of remedy, and of administration cannot be permitted to operate." *Vaca v. Sipes*, 386 U.S. 171, 178-79, 87 S. Ct. 903, 910 (1967) [quoting *Garmon*]. Furthermore, "[C]entralized administration of specially designed procedures [is] necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid [the] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 192, 98 S. Ct. 1745, 1755 (1978).

In *Garmon*, this Court stated the basic rule of preemption is that, if the conduct that the state seeks to regulate is "actually or arguably" protected under Sections 7 or 8 of the NLRA, then the action is preempted. *Id.* at 245. Since then the test has been refined and broadened to determine which conduct is arguably subject to the jurisdiction of the NLRB. The current statement of federal labor law preemption, as laid down in *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters, supra*, 436 U.S. at 180, is as follows:

> The critical inquiry is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the labor board.

Id. at 197.

Thus, in order to determine whether a particular controversy presented to the state court is preempted, it must be determined whether it was one that could have been presented to the NLRB. If it is a claim that could have been brought before the NLRB, it is preempted. *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters, supra*, 436 U.S. at 202. Furthermore, it is only necessary that the party arguing for preemption show that the controversy is "arguably" subject to the NLRB's exclusive jurisdiction as, in cases where the answer is not clear, the determination must be made in the first instance by the NLRB itself. *San Diego Bldg. Trades Council v. Garmon, supra*, 359 U.S. at 244-45.

George's state court Complaint fell well within these rules of preemption. As correctly found by the Fourth District Court of Appeal, George's Complaint was nothing more than an attempt to enforce an order of the NLRB. Enforcement of the NLRB orders is a matter given exclusively to the NLRB, not courts. *National Labor Relations Bd. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265, 266 (1940).

Furthermore, George cannot escape preemption by attempting to artfully plead her claim as one for breach of contract. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1516-1518 (11th Cir. 1988); *Richardson v. Krucko & Fries*, 966 F.2d 153, 158 (4th Cir. 1992). This Court has emphasized that the labels given to claims are not relevant in the labor preemption context. Rather, courts are concerned with "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Local 100, United Ass'n of Journeymen v.*

Borden, 373 U.S. 690, 698 (1963); *Garmon, supra*, 359 U.S. at 246; *Jones, supra*, 460 U.S. at 675-84.

It also is of no significance that the defendants in this action, the Zlotoffs, are not currently an "employer" of George. Such fact has *no* bearing on whether George's claim is preempted. State law claims are subject to *Garmon* preemption even where the defendant is nether a union, an employer nor the employer's agent. Whether state law claims are preempted under *Garmon* is determined not by the identity of the party against whom the claims are asserted but rather the issues that those claims require a court to adjudicate. It is enough if the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRA. *Jones, supra*, 460 U.S. at 682; *Richardson v. Krucko & Fries, supra*, 966 F.2d at 156-57 [lawsuit filed against employer's counsel held to be preempted]; *Lumber Prods. Industrial Workers Local #1054 v. West Coast Industrial Relations Ass'n*, 775 F.2d 1042, 1049 (9th Cir. 1985).

George also contends that, because she has sued someone that does not fall within the category of an employer, the NLRA is unable to act on her claim. This argument is likewise irrelevant to the preemption analysis. This Court has made clear that state law claims may be preempted even when a plaintiff is without a remedy under the NLRA. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 77 S. Ct. 598 (1957) [holding that state law claims are preempted even when the NLRB refuses to assume jurisdiction]. The fact that state law might provide remedies unavailable under the NLRA has never been a basis for avoiding *Garmon* preemption. *Garmon, supra*, 359 U.S. at 246-47; *Jones, supra*, 460 U.S. at 684.

At any rate, the NLRB clearly would have the power to rule on George's claim. The NLRB has on many occasions enforced NLRB orders against individuals or entities who, by contract, have allegedly agreed to assume liability for such orders. *Liberty Elecs. Corp.*, 143 N.L.R.B. 605, 617 (1963); *Sinko Mfg. & Tool Co.*, 154 N.L.R.B. 1474 (1965); *Emerson Elec. Co.*, 176 N.L.R.B. 744 (1969).

As the foregoing authority makes clear, the Fourth District Court of Appeal's decision was well within this Court's test for *Garmon* preemption. The decision is wholly supported by and consistent with the holdings of this Court and the federal courts. In fact, if George's argument were accepted, it would create a large loophole in the *Garmon* preemption scheme. George has sought to escape the broad reach of *Garmon* preemption by artfully pleading her claim to enforce the NLRB order as one for breach of a third-party beneficiary contract and by attempting to argue that the Zlotoffs were not employers within the scope of the NLRA. Permitting circumvention of the *Garmon* preemption doctrine through such artful pleading of claims, as was done in this case, would allow parties to take labor disputes to court, a result that would undermine the NLRB's primary jurisdiction in labor law and raises a substantial risk of conflict between federal and state law in this area. *Richardson v. Krucko & Fries*, *supra*, 966 F.2d at 157.

B. The Section 301 Cases Cited By George Are Completely Irrelevant To A *Garmon* Preemption Analysis.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), gives both federal and state courts

subject matter jurisdiction over suits alleging a breach of a collective bargaining agreement between the employer and a labor organization. Therefore, if conduct that constitutes an unfair labor practice also violates the collective bargaining agreement, federal and state courts and the NLRB exercise concurrent jurisdiction. *Smith v. Evening News Ass'n*, 371 U.S. 195, 197, 83 S. Ct. 267 (1962); *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1252 (4th Cir. 1988). Accordingly, case law involving suits brought under Section 301 of the LMRA are completely irrelevant to a discussion of *Garmon* preemption, which involves the *exclusive* jurisdiction of the NLRB. *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flower Co.*, 369 U.S. 95, 101, n.9 (1962); *Smith v. Evening News Ass'n, supra*, 371 U.S. at 197-98; *Vaca v. Sipes, supra*, 386 U.S. at 179-80; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245, n.5 (1962).

In this case, George is not filing suit seeking to enforce the terms of a collective bargaining agreement pursuant to Section 301 of the LMRA. Accordingly, the cases cited by George at pages 18 through 26 of her Petition are inapplicable and irrelevant to a determination of whether the Fourth District Court of Appeal's decision on preemption was correct.

C. Allowance Of George's State Court Complaint Threatens Interference With National Policy Regarding Labor Relations.

The rationale for preempting state law claims that are only "arguably" within the NLRB's jurisdiction is that to do otherwise would pose a great danger of conflict

between federal labor law and state law. *San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. at 244.

The danger of interference with national labor policy is particularly evident here where George brought the same claim before the NLRB in her union's August 1990 unfair labor practice charge. The NLRB determined on the merits that the Zlotoffs were not liable under NLRA law for earlier NLRB orders against Aztec. In doing so, the NLRB rejected the attempt to hold the Zlotoffs liable pursuant to the 1986 Stock Purchase Agreement. Because George had her "day in court" before the NLRB, she may not now attempt to relitigate the same claim in state court. Preemption by the NLRB's exclusive jurisdiction is particularly appropriate where, as here, the claim has been previously brought before the NLRB, and then, after rejection, is recast as a state law claim. *Parker v. Connors Steel Co., supra,* 855 F.2d at 1517. By initially bringing this claim before the NLRB first, George has "implicitly recognized the Board's jurisdiction over [her] claims." *Id.*

A danger of conflict with federal labor law is further shown by the fact that only the NLRB itself, not an individual employee, may enforce an NLRB order. *Amalgamated Util. Workers v. Consolidated Edison Co., supra,* 309 U.S. at 265; *Stewart Die Casting Corp. v. National Labor Relations Bd.,* 132 F.2d 801, 803-04 (7th Cir. 1942). Although George might properly contest the NLRB order, she had no individual standing to enforce that order in state court or otherwise. *Amalgamated Util. Workers v. Consolidated Edison Co., supra,* at 265. Thus, permitting state court adjudication of George's Complaint seeking enforcement of an NLRB back pay order would *directly* conflict and interfere with federal labor policy and the

NLRB's exclusive jurisdiction over matters of compliance and enforcement of its order.

4. CONCLUSION

The broad application given to federal labor law preemption requires that state courts may not assume jurisdiction over claims that are even "arguably" within the exclusive jurisdiction of the NLRB. The Fourth District Court of Appeal correctly found that plaintiff's claim, which was in essence an attempt to enforce an order of the NLRB, fell squarely within that preemption doctrine. George has not cited to this Court a single case that is in conflict the Fourth District's decision. In fact, all U.S. Supreme Court case authority addressing the parameters of *Garmon* preemption are consistent with and supportive of the Fourth District's ruling. Accordingly, no basis for review of the Fourth District Court of Appeal's decision exists in this case, and George's Petition must be denied.

Respectfully submitted,

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